ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147

COMMENTS OF ALLEGIANCE TELECOM, INC.

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SUMMARY

Allegiance supports the Commission's efforts in this proceeding to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans," pursuant to Section 706 of the Telecommunications Act of 1996 ("1996 Act").[1] Allegiance believes that the most significant barrier to infrastructure investment and provision of advanced services to all Americans is the continuing failure of incumbent LECs to fully open up their networks to competition. Allegiance and other competitive LECs are taking vigorous steps to provide advanced services to Americans throughout the country. Competitive entrants, however, continue to be frustrated in significant respects by incumbents' intransigence, and by the imposition of unreasonable terms and conditions on collocation of equipment in incumbents' central offices. Allegiance strongly supports the Commission's proposals in this proceeding to strengthen collocation and unbundling requirements.

Allegiance does not support the Commission's proposal to permit incumbent LECs to establish separate unregulated affiliates for provision of advanced services. This proposal far exceeds anything contemplated in the Communications Act and would inevitably permit the incumbent to favor its affiliate to the detriment of new entrants and competition. Moreover, deregulation will not encourage incumbent LECs to provide advanced services. Rather, it is the prospect of competition that best encourages incumbent LECs to provide advanced services.

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[1] Pub. L. 104-104, Title VII, Sec. 706, Feb. 8, 1996, 110 Stat. 153, reproduced in the notes under 47 U.S.C. Sec. 157.

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Allegiance Telecom, Inc. ("Allegiance") respectfully submits the following comments in response to the Notice of Proposed Rulemaking issued in this proceeding concerning the deployment of advanced telecommunications capability to all Americans.[2]

Allegiance is a competitive local exchange (LEC), interexchange, and international carrier that is rapidly expanding its provision of various competitive telephone services, Internet access, operator services, and high speed data services to areas throughout the country. Allegiance affiliates have received or are in the process of receiving authority to provide local exchange and interexchange service in several jurisdictions nationwide. Allegiance affiliates are currently providing service in and near New York City and in areas within Texas, Illinois and Georgia. Further, Allegiance affiliates have also been authorized to provide service throughout the states of

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[2] *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Notice of Proposed Rulemaking, CC Docket No. 98-147, FCC 98-188, released August 7, 1998 ("*Section 706 NPRM*").

New Jersey (for resale), California, Maryland and Massachusetts. Allegiance affiliates have applications pending for certificates of authority to provide local exchange and interexchange telecommunications service in New Jersey (for facilities-based services), in the District of Columbia, Pennsylvania and Virginia. Allegiance affiliates will soon file applications to provide telecommunications services in Colorado, Michigan, and Washington and expects to follow shortly thereafter with similar applications in other states. Allegiance Telecom International, Inc. has received authority under section 214 of the federal Communications Act of 1934, as amended, from the Commission to provide international facilities-based and resale services between the United States and other countries.

I. COLLOCATION

A. National Standards.

Incumbent LECs are inconsistent in the standards of collocation they impose on CLECs in that what one carrier finds feasible and/or has been ordered by a state commission, another strenuously objects to. Adoption of national standards would encourage the deployment of advanced services by increasing predictability and certainty, and by facilitating entry by competitors operating in several states. Allegiance strongly supports the Commission's proposal to adopt national collocation standards pursuant to Sections 201 and 251 of the Act.[3] Because incumbent LEC networks and facilities generally use the same technologies, the Commission should determine that any collocation practice permitted by one incumbent LEC should be required of all incumbents. The Commission should adopt strengthened collocation rules regardless of whether incumbent LECs

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[3] *Section 706 NPRM* at 123.

choose to establish an advanced services affiliate. Such strengthened rules would promote the provision of advanced services and of competitive services generally notwithstanding whatever choice incumbent LECs make concerning their own provision of advanced services.

B. Collocation Equipment.

Eligible Equipment. There is no basis for differentiating between circuit or packet switching equipment for purposes of collocation. Both kinds of switches are increasingly combined with other equipment, such as multiplexers, that CLECs may already collocate. Restrictions on collocation of switches impose artificial constraints on design and manufacture of equipment that result in inefficiencies and increased costs. The Commission should mandate that incumbent LECs permit collocation by CLECs of virtually any kind of telecommunications equipment used for voice and data telecommunications. CLECs should be permitted, for example, to collocate Digital Subscriber Line Multiplexers (DSLAMs). Collocation of these types of equipment would promote the goals of the Act by facilitating provision of advanced services by new competitive entrants.

Expansion of collocation rights to providers of information services could rapidly exhaust central office space. This could thwart the competitive provision of telecommunications services that is envisioned in the 1996 Act. Accordingly, Allegiance supports the Commission's tentative conclusion not to allow collocation for providers of information services.[4]

Interconnection between CLECs. Allegiance supports the Commission's effort to examine whether any further measures are necessary to assure that CLECs may interconnect with other

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[4] *Section 706 NPRM* at para. 132.

CLECs collocating in an incumbent's central office.[5] Direct interconnection in the incumbent's central office between CLECs is frequently the most technically efficient and cost effective way for CLECs to interconnect.

Safety Standards. Allegiance's experience is that incumbent LECs sometimes use safety standards as a way of thwarting or delaying collocation. Allegiance supports reasonable safety standards on equipment eligible for collocation such as Network Equipment Building Specifications (NEBS) standards. However, the Commission should prohibit incumbent LECs from imposing safety standards that are more stringent than those that they apply to themselves. The Commission should also establish enforcement guidelines to ensure incumbent LEC compliance.

C. Cageless Collocation.

Incumbents use caged collocation to impose a number of arbitrary ordering, construction, and installation requirements that often substantially delay collocation. Cageless collocation would eliminate this opportunity for thwarting collocation. Cageless collocation is technically feasible in that it is no different technically from collocation within cages. Further, there is no basis for precluding cageless collocation based on security issues because CLECs have as strong an interest as incumbents in maintaining the security of central offices. Accordingly, the Commission should mandate that carriers offer cageless collocation, but should also allow for the use of security cabinets at the CLEC's option.

The Commission should establish the terms and conditions of cageless collocation as well as procedures that CLECs may use to obtain collocation that will prevent incumbent LECs from

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[5] *Section 706 NPRM* at para. 133.

creating new barriers to collocation such as unnecessary security or space preparation requirements. Adoption of detailed procedures, including time limits, under which incumbent LECs must provide cageless collocation would make cageless collocation workable for both incumbents and CLECs. Allegiance believes that incumbent LECs should be required to provide cageless collocation within 15 days from initial ordering. Allegiance also urges that incumbent LECs not be allowed to require a final interconnection agreement or state certification as a precondition of ordering and obtaining collocation space.

D. Elimination of Space Constraints.

In order to ameliorate space shortages in central offices, Allegiance urges the Commission to require LECs to make collocation a design criterion of all new central offices; to make unused space immediately available for collocation; to replace older equipment; and to install all new equipment in a space-efficient manner. These measures would provide significant additional space for collocation because in many instances LECs' central offices have not been designed to economize on space usage. There may be unused space, or incumbent LECs may also be using older equipment that takes up a great deal of space.

The Commission's current requirement that incumbents give up space prior to denial of virtual collocation does not adequately constrain an incumbent's ability to warehouse space.[6] Further, many incumbent LECs have been moving administrative offices into conditioned space

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[6] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No.96-98, First Report and Order, 11 FCC Rcd 15499, 15805-15806, paras. 694-606 (1996) (*Local Competition Order*), *vacated in part, aff'd in part*, Iowa Utils. Bd. V. FCC, 120 F.3d 753 (8th Cir. 1997), *cert. granted on other grounds sub nom.* AT&T Corp. v. Iowa Utils. Bd., 118 S.Ct. 879 (1998).

within central offices, another practice that depletes space and increases collocation construction costs. The Commission should also require that incumbents give up any space held in reserve prior to denial of physical collocation, and should prohibit further use of central office space for administrative purposes.

The Commission should adopt its proposal that incumbent LECs prove that there is insufficient central office space for collocation by means of a tour of the central office provided to the CLEC.[7] The Commission should also adopt its proposal that incumbents provide to CLECs on request a report showing available collocation space.[8] These measures would to be very beneficial to CLECs and should not unduly burden incumbents. Additional information concerning available collocation space could help industry and regulators informally monitor incumbent LECs collocation practices by making such information readily available.

In the *Section 706 NPRM*, the Commission also asks what measures it could adopt that would facilitate use of virtual collocation for provision of advanced services.[9] Allegiance urges the Commission to establish a regulatory framework for virtual collocation pursuant to which CLECs can own and control the collocated equipment. Allowing CLECs to install their own equipment on a basis that is closely integrated with incumbent LEC facilities in the central office would take far less space than caged or cageless physical collocation while providing many of the benefits of physical collocation.

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7 *Section 706 NPRM* at para. 146.

8 *Section 706 NPRM* at para. 147.

9 *Section 706 NPRM* at 148.

II. LOCAL LOOP REQUIREMENTS

A. National Standards

National standards for local loop unbundling would promote the goals of the Act by enabling CLECs and incumbents to know in greater detail than at present their respective rights and obligations. National standards would permit achievement of negotiated agreements on a more efficient basis by avoiding the need to deal with a myriad of varying carrier requirements. The Commission should adopt as a national standard any unbundling option or practice requested by CLECs that any incumbent LEC provides or that any state commission has directed an incumbent to provide.

B. Conditioned Loops

A key national standard that will be critical to the ability of new entrants to provide advanced services will be a national standard that incumbent LECs must provide "conditioned" loops, *i.e.* loops that are free of bridge taps, load coils, and midspan repeaters, on request. Without adequately conditioned loops, new entrants will be unable to provide advanced services.

C. OSS Rules

Allegiance supports the Commission's proposal, as part of rules governing Operational Support Systems (OSS), to require incumbent LECs to provide competitive LECs on request with sufficient information about the loop to enable them to determine whether the loop is capable of supporting xDSL.[10] However, while this information would enable CLECs to determine the extent to which loops are suitable for use with any equipment or services that the CLEC may be planning

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[10] *Section 706 NPRM* at para. 157.

to use or provide, a requirement that incumbent LECs provide the information should not be used as a substitute for a requirement that incumbents provide conditioned loops on request. As noted, the ability to obtain conditioned loops is essential to CLECs ability to provide advanced services. Allegiance urges the Commission to reject any incumbent LEC arguments that they do not have sufficiently detailed, or readily available, information about their loops. The Commission should require incumbent LECs to obtain and organize the necessary information in order to comply with this information disclosure requirement.

D. Loop Spectrum Management

Allegiance urges the Commission to rely on further industry input and industry consensus prior to adopting technical loop spectrum management standards. Any such consensus must be based on participation by all industry segments. Loop spectrum management standards should not be designed to thwart or delay competitive entry such as, for example, interference standards that favor the incumbent's own service offerings or equipment service vendors.

Allegiance believes that it would promote the goals of Section 706 to allow a CLEC to use part of the available spectrum of the loop to provide advanced service while the incumbent continues to provide voice service over the same loop. This would establish new regulatory options for provision of advanced services to consumers. This loop sharing would not create significant technical difficulties because existing modems and DSLAMs already permit provision of different data services, or voice and data over the same loop. Accordingly, Allegiance supports the Commission establishing a right of two different service providers to offer services over the same loop, such as by utilizing different parts of the DSL spectrum to provide different data services, or

voice and data service. Allegiance urges that incumbents not be permitted to establish unnecessary or unrealistic technical barriers that would thwart CLECs' provision of advanced services.

E. Uniform Standards for Attachment of Electronic Equipment at the Central Office

Allegiance supports the Commission's proposal to establish uniform, national standards for attachment of electronic equipment at the central office analogous to the Part 68 program for connection of customer-provided equipment to the telephone network.[11] The Commission should move forward with this proposal on an expeditious basis.

F. Sub-Loop Unbundling

Loop unbundling requirements should be extended to sub-loop elements, such as by access to feeder cable, portions of loops, and remote terminals.[12] In many situations, such as where a loop is provisioned by means of a digital loop carrier (DLC) system at the central office or where there is insufficient collocation space at the central office, subloop unbundling may be the only feasible way for a CLEC to access the loop in order to provide advanced services. Sub-loop unbundling can be accomplished by access at intermediate points in the loop between the central office and the end user's premises such as at telephone poles and remote pedestals by means of standard industry cross-connect and wiring techniques. Thus, sub-loop unbundling is technically feasible. The Commission should specify that incumbent LECs may not raise technical issues as a barrier to providing subloop unbundling to a requesting CLEC.

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[11] *Section 706 NPRM* at para. 163; 47 C.F.R. Part 68. Customers have a right to connect equipment to the public switched telephone network in ways that are privately beneficial with being publically detrimental. *Hush-A-Phone Corp. v. United States*, 238 F.2d 266 (D.C. Cir. 1956).

[12] *Section 706 NPRM* at para 173.

National unbundling standards should also permit CLECs to use the portion of the loop obtained through sub-loop unbundling for provision of any telecommunications service. This will permit CLECs to choose to provide services based on market forces and demand for services, not on incumbent's efforts to thwart competition or artificial regulatory restrictions.

Incumbent LECs should also not be allowed to raise space constraints at pedestals or remote terminals as a barrier to sub-loop unbundling. Instead, the Commission should require incumbents to address any space shortage by constructing an additional pedestal or remote terminal and using standard industry bridging techniques to connect it to the original pedestal or remote terminal. This is a practical and affordable solution to eliminating any space constraints at remote terminals and pedestals.

III. EXCHANGE ACCESS OR LOCAL EXCHANGE SERVICE

Allegiance is concerned that portions of the *Section 706 NPRM* reflect the view that advanced services could constitute exchange access.[13] However, it is unlikely that DSL services could be appropriately classified as exchange access services. Section 3(16) of the act states that exchange access service "means the offering of access to telephone exchange services or facilities for the purpose of origination or termination of telephone toll services."[14] Thus, an advanced service is not an exchange access service unless used solely for the purpose of completing telephone toll calls. This statutory definition would preclude services which are not associated with telephone

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[13] *Section 706 NPRM* at para. 189.

[14] 47 U.S.C. Sec. 153(16).

service, such as most data and Internet services - the very services which are likely to be considered advanced - from being considered exchange access

Allegiance agrees with the Commission's tentative conclusion that the resale obligations of Section 251(c)(4) would apply to any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers, regardless of whether the telecommunications service in question is classified as local exchange service or exchange access service.[15] This would seem to be the only result consistent with the statute.

IV. DIRECT OPTICAL INTERCONNECTION

Allegiance requests that the Commission issue a declaratory ruling in this proceeding that incumbents must provide to requesting interconnecting carriers direct optical interconnection of optical facilities.[16] Allegiance has found that incumbent LECs will not permit Allegiance to establish a direct optical connection between Allegiance's and the ILEC's fiber optic facilities either collocated in the incumbent's central offices or at other points in the network where it would be technically feasible to do so. Instead, Allegiance is required to terminate its facilities in equipment that converts the optical signal to an electrical one which is then reconverted to an optical signal by the incumbent LEC for retransmission on the incumbent's optical facilities. These requirements impose unnecessary costs on CLECs and hinder their provision of advanced services.

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[15] *Section 706 NPRM* at para. 189.

[16] Allegiance also requested that the Commission issue this declaratory ruling as part of its Section 706 inquiry concerning advanced telecommunications capability, CC Docket No. 98-146. *See* Comments of Allegiance Telecom, Inc, filed September 14, 1998. Allegiance urges the Commission to issue this declaratory ruling in whichever proceeding the Commission determines is most appropriate.

Moreover, these requirements violate Section 251(c)(2) and the Commission's determinations in the *Local Competition Order* implementing that provision.[17] In the *Local Competition Order*, the Commission determined that "technically feasible" as used in Section 251(c)(2) refers solely to technical or operational concerns, rather than economic, space, or site considerations;[18] that incumbent LECs must modify their facilities to the extent necessary to accommodate interconnection or access to network elements;[19] that the Act bars considerations of cost in determining what is "technically feasible";[20] and that incumbent LECs must prove to the appropriate state commission that interconnection or access at a point is not technically feasible.[21] Further, the Commission determined that an incumbent LEC would violate the duty to be "just" and

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[17] Section 251(c)(2) of the Communications Act imposes on incumbent LECs the "duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network–

> (A) for the transmission and routing of telephone exchange service and exchange access;
> (B) at any technically feasible point within the carrier's network;
> (C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and
> (D) on rates, terms, conditions that are just, reasonable, and nondiscriminatory, in accordance with terms and conditions of the agreement and the requirements of this section and section 252. 47 U.S.C. Sec. 251(c)(2).

[18] *Local Competition Order* at para. 198. The Commission established several minimum technically feasible points of interconnection: the line side of a local switch, the trunk-side of a local switch; the trunk interconnection points for a tandem switch; and central office cross connect points in general. *Local Competition Order* at para. 210.

[19] *Local Competition Order* at para. 198.

[20] *Local Competition Order* at para. 199.

[21] *Local Competition Order* at para. 205.

"reasonable" under Section 251(c)(2)(D) if it provided interconnection to a competitor in a manner less efficient than an incumbent LEC provides itself;[22] and that the obligation to provide interconnection that is equal in quality to that provided itself requires the incumbent LEC to meet the same technical criteria and service standards that are used within their own networks.[23]

Incumbent LECs' refusal to provide direct optical interconnection violate Section 251(c)(2) and the Commission's implementing requirements established in the *Local Competition Order* because direct optical connections are technically feasible in that direct optical connections constitute a standard industry practice; because incumbents are not providing interconnection to CLECs that is equal in quality to that provided to themselves when they require competitors to use the more costly and less efficient electrical/optical terminating equipment; and because these incumbent LEC requirements hinder the development of competition.

Allegiance urges the Commission to require incumbent LECs to permit interconnection through direct fiber meet arrangements in incumbent central offices or at other points in the network where it is technically feasible to do so. Such interconnection can be accomplished by use of optical cross connects of the type already widely used in the industry. Incumbents should be required to offer the full array of interface options that are normally associated with direct optical connections such as the single mode fiber (SMF) 28 interface.[24] The Commission should also require that incumbents offer both channelized and unchannelized high capacity interfaces such as OC3 and

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[22] *Local Competition Order* at para. 219.

[23] *Local Competition Order* at para. 224.

[24] The SMF 28 interface is a standard fiber interface that involves use of a grade of fiber equivalent to that employed by most incumbent LEC's.

OC3c. Of course, under Section 251(c)(2), it would also be necessary for the incumbent LEC to provide these optical interconnection arrangements at reasonable rates.

Allegiance believes that these actions could be accomplished by a declaratory ruling because they are encompassed within the Commission's previous determinations in the *Local Competition Order* implementing Section 251(c)(2). Alternatively, the Commission should adopt a rule in this proceeding that incumbents must provide direct optical interconnection to requesting CLECs by means of standard optical interfaces such as the SMF 28 interface. Allegiance emphasizes that direct optical connection is a well understood and widely deployed industry practice. Therefore, Allegiance's proposal does not carry any significant risk of network harm.

V. DARK FIBER SHOULD BE AN UNBUNDLED NETWORK ELEMENT

In the *Section 706 NPRM*, the Commission sought comment on the specific unbundling obligations it should impose on network elements used by incumbent LECs in the provision of advanced services.[25] Allegiance urges the Commission in this proceeding to take steps to promote the availability of dark fiber by resolving the uncertainty concerning the regulatory status of dark fiber and by determining the dark fiber is a UNE. Fiber cable has become the premier communications transmission facility combining low cost, efficiency, and huge capacity. Its broader availability from incumbent LECs to competing local service providers would substantially promote competition in provision of advanced services.

Whether incumbent LECs are obligated to provide dark fiber, and if so, on what terms and conditions, has been clouded by the uncertain regulatory status of dark fiber. In 1988, in connection

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[25] *Section 706 NPRM* at para. 180.

with an investigation of individual case basis (ICB) pricing policies of LECs, the Commission determined that dark fiber ICB offerings of LECs were common carrier offerings subject to the Commission's jurisdiction.[26] Subsequently, the Commission denied LECs' request pursuant to Section 214(d) of the Act to discontinue their dark fiber offerings.[27] The Commission found that dark fiber is subject to Title II regulation because it is "wire communications" offered on a common carrier basis and that LECs had not shown that withdrawal of the offering would not adversely affect the public interest.[28] Later, the Commission permitted LECs to cease new offerings of dark fiber, but required continuation of existing offerings. The United States Court of Appeals for the District of Columbia Circuit then remanded these decisions to the Commission finding that the Commission had not adequately justified its reasoning in finding that dark fiber was a common carrier offering.[29] In addition, in 1990 EDS Corporation filed a petition for declaratory ruling asking the Commission to determine that LECs have an obligation to furnish dark fiber on a common carrier basis.[30] The dark fiber issues on remand and the EDS petition remain pending before the Commission after four and eight years, respectively.

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[26] *Local Exchange Carriers' Individual Case Basis DS3 Offerings (ICB Reconsideration)*, CC Docket No. 88-136, FCC 90-270, 5 FCC Rcd 4842 (1990).

[27] 47 U.S.C. Sec 214(d).

[28] *Southwestern Bell Telephone Company*, File No. W-P-C-6670, 8 FCC Rcd 2589 (1993).

[29] *Southwestern Bell Telephone Company v. FCC*, 19 F.3d 1475 (D.C. Cir. 1994).

[30] *Local Exchange Carriers' Individual Case Basis DS3 Offerings, Request for Declaratory Ruling*, CC Docket No. 88-136, filed October 3, 1990.

The issue of whether dark fiber should be an unbundled network element is also squarely before the Commission. Section 3(29) of the Act defines a network element as "... a facility or equipment used in the provision of a telecommunications service ..." [31] It is evident that dark fiber meets this definition because dark fiber is a facility used to provide telecommunications service. The *Local Competition Order* expressly declined to reach the issue of whether dark fiber should be considered an unbundled network element.[32] However, this issue has been raised in pending petitions for reconsideration filed by interexchange carriers who argue that dark fiber should be considered an unbundled network element.[33]

The unsettled regulatory status of dark fiber represents a substantial barrier to competitive service providers in negotiating for and obtaining dark fiber from incumbent providers. The Commission should resolve these issues on an expeditious basis by determining in this proceeding that dark fiber is a common carrier offering and by determining that dark fiber is an unbundled network element under Section 251 that ILECs are required to provide to requesting telecommunications carriers.[34]

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[31] 47 U.S.C. Sec. 153(29).

[32] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No.96-98, First Report and Order, 11 FCC Rcd 15499, 15722 (1996) (*Local Competition Order*), *vacated in part, aff'd in part*, Iowa Utils. Bd. V. FCC, 120 F.3d 753 (8th Cir. 1997), *cert. granted on other grounds sub nom.* AT&T Corp. v. Iowa Utils. Bd., 118 S.Ct. 879 (1998).

[33] *See* Petition of AT&T Corp. for Reconsideration and/or Clarification, CC Docket No. 96-98, filed September 30, 1998; Petition for Reconsideration of MCI Telecommunications Corporation, CC Docket No. 96-98, September 30, 1998.

[34] The Commission should also require that dark fiber be provided on a tariffed basis. This would enable persons who are not "requesting telecommunications carriers" under Section 251, and carriers for whom it may be burdensome to effectively participate in interconnection

VI. ADVANCED SERVICES AFFILIATES

A. The Proposed Scheme of Unregulated Separate Affiliates Is Unlawful

Section 251(h) of the Act defines incumbent local exchange carrier as follows:

> (h) DEFINITION OF INCUMBENT LOCAL EXCHANGE CARRIER.--
>
> (1) DEFINITION.-- For purposes of this section, the term "incumbent local exchange carrier" means, with respect to an area, the local exchange carrier that–
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> (A) on the date of enactment of the Telecommunications Act of 1996, provided telephone exchange service in such area; and
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> (B)(i) on such date of enactment, was deemed to be a member of the exchange carrier association pursuant to section 69.601(b) of the Commission's regulations (47 C.F.R. 69.601(b)); or
>
> (ii) is a person or entity that, on or after such date of enactment, became a successor or assign of a member described in clause (i).[35]

In the *Section 706 NPRM*, the Commission interprets this statutory definition to authorize the unregulated provision of advanced services by an affiliate that (1) satisfies adequate structural separation requirements (*i.e.* is "truly" separate); and (2) acquires, on its own, facilities used to provide advanced services (or leases such facilities from an unaffiliated entity) is not an incumbent LEC.

However, Allegiance does not believe that structural separation is determinative of whether an affiliate is a successor or assign. Thus, it might be possible for example, for an incumbent LEC to sell part of its local exchange business and facilities to a completely unrelated and independent company and yet that company would be a successor or assign fully subject to the unbundling

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negotiations, to obtain dark fiber by ordering it out of a tariff.

[35] 47 U.S.C. Sec. 251(h)(1); *Section 706 NPRM* at para. 92.

obligations of Section 251. Because a completely independent company can be a successor or assign, no structural safeguards, no matter how effective or stringent, will be sufficient to immunize an affiliate from being a successor or assign. Therefore, the Commission's efforts to establish structural separation as a way of permitting an affiliate to receive funds, assets, and be owned and controlled by the incumbent and yet not be subject to regulation is unlawful. Allegiance emphasizes that the statutory definition of incumbent LEC uses "successor or assign" not "structural separation."

Moreover, Congress' purposes in establishing a definition of incumbent LEC was not to provide a loophole for incumbent LECs to escape the interconnection and unbundling obligations of Section 251. The fundamental purpose of Section 251 is to impose key market opening obligations on incumbent LECs that would help achieve Congress' purposes of building a competitive market for the provision of telecommunications. It is not reasonable, therefore, to interpret the statute to authorize any significant opportunity for them to escape those obligations. While as a matter of narrow logic a definition of incumbent LEC must mean that entities not meeting that definition are not incumbent LECs, the Commission should look to the basic purposes of the 1996 Act in evaluating its separate affiliate proposal. Allegiance believes that the scope of any permissible way for incumbents to escape the obligations of Section 251 by means of a separate affiliate must be narrowly construed. The possibility that incumbents could use a wholly-owned and controlled affiliate to provide significant telecommunications services free from Section 251 obligations goes much further than anything directly envisioned in the Act or its legislative history and would be unlawful.

Moreover, an assign is a party who has received an assignment of property or contract rights.[36] Similarly, an assign is an entity "to whom, property is, or will, or may be assigned."[37] While Allegiance does not necessarily believe that any transfer of property should impose on an affiliate the full obligations of Section 251(c), a literal application of the statute could potentially achieve that result, at least if the affiliate possessed any assets to which those obligations could be applied. Accordingly, Allegiance urges the Commission to adopt a strict interpretation of "successor or assign."

B. The Proposed Asset Transfers are Not *De Minimis* and Would Make the Affiliate a "Successor or Assign"

While the *Section 706 NPRM* purports to adopt the view that the incumbent could not generally make significant asset transfers to the affiliate, in reality the Commission appears to be considering very significant transfers. Thus, the proposed alleged *de minimis* exceptions to the general prohibition on transfers of assets to the affiliate are sweeping in scope. Apparently, transfers of facilities that are, or could be, unbundled network elements (UNEs),[38] network equipment necessary to provide advanced services, communications equipment for the purpose of testing new services,[39] and assets other than communications facilities including customer proprietary network information (CPNI), customer accounts, employees, and brand names[40] are all within the scope of

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36 *Restatement of Contracts Second,* Sec 323, Comment b.

37 Black's Law Dictionary (6th ed. 1990).

38 *Section 706 NPRM* at para. 106.

39 *Section 706 NPRM* at para. 112.

40 *Section 706 NPRM* at para. 113.

the Commission's contemplation of the *de minimis* exception.[41] Indeed, the Commission appears to have tentatively ruled out only wholesale transfers of loops[42] and incumbent central offices.[43] UNEs, brand names, and CPNI are key assets that derive, and are inseparable, from the fact that the incumbent has been, and continues to be, the monopoly provider everywhere of local service.

Morever, such transfers could be combined with other benefits the Commission is contemplating allowing the incumbent to bestow on the affiliate. Thus, the affiliate might also be permitted to leave some or all of any such "transferred" equipment in place,[44] and engage in joint marketing insofar as the affiliate is able to use customer proprietary network information gathered by the incumbent.[45]

Allegiance believes that the breadth of asset transfers and other relationships permitted between the incumbent and affiliate, combined with full ownership and control of the affiliate by the incumbent, would make the affiliate a "successor or assign." In this connection, in many areas the Commission has established ownership and attribution rules that identify when related companies should be treated as a single company for regulatory purposes such as concerning broadcast regulation. The Commission's failure to consider whether such rules are necessary here in order to preclude the affiliate from becoming a successor or assign is a glaring omission. Allegiance

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41 *Section 706 NPRM* at para. 108.

42 *Section 706 NPRM* at para. 107.

43 *Section 706 NPRM* at para. 113.

44 *Section 706 NPRM* at para. 110.

45 *Section 706 NPRM* at para. 106.

believes that any affiliate in which an incumbent has greater than a ten percent interest would make the affiliate a "successor or assign."

C. Stringent Safeguards Should be Adopted

The Commission has long recognized the need for stringent safeguards for incumbent LECs' provision of services on an unregulated basis.[46] The Commission's proposed safeguards, however, would permit the affiliate to enjoy many of the benefits to incumbency to the detriment of new competitive entrants.

For example, while the Section 706 NPRM apparently ruled out joint ownership of switches,[47] joint operation and ownership of transmission facilities was not. The affiliate's ability to share transmission facilities, or indeed any facilities, is a significant advantage especially if the sharing arrangement provides that sharing is based on a valuation of the property at book or depreciated value, thus passing on substantial cost savings to the affiliate. Obviously, any ability of the affiliate to engage in joint marketing, use the incumbent's CPNI or its trade names would confer substantial advantages on the affiliate. The Commission should prohibit any sharing of facilities, or joint marketing or use of trade names

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[46] *See e.g., Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer III),* Report and Order, CC docket No. 85-229, Phase I, 104 FCC 2d 958 (1986) *(Phase I Order), recon.,* 2 FCC Rcd 3035 (1987) *(Phase I Recon Order), further recon.,* 3 FCC Rcd 1135 (1988) *(Phase I Further Recon. Order), second further recon.,* 4 FCC Rcd 5927 (1989) *(Phase I Second Further Recon.), Phase I Order and Phase I Recon. Order, vacated, California v. FCC, 905 F.2d 1217 (9th Cir. 1990) (California I);* Phase II, 2 FCC Rcd 3072 (1987) *(Phase II Order), recon.,* 3 FCC Rcd 1150 (1988) *(Phase II Recon. Order), further recon.,* 4 FCC Rcd 5927 (1989) *(Phase II Further Recon. Order), Phase II Order vacated, California I,* 905 F.2d 1217 (9th Cir. 1990); *Computer II Remand Proceedings,* 5 FCC Rcd 7719 (1990) *(ONA Remand Order), recon.,* 7

[47] *Section 706 NPRM* at para 96.